

Military Justice and the Media: The Media Interview

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Introduction

You know you are having a bad day when your commanding officer calls you up and congratulates you on being selected for a special assignment--being your Service's representative for a media interview--about a pending court-martial--that is front page news--oh, and the interview will be on *60 Minutes*. After the initial shock wears off, and you mutter the obligatory, "Thank you, Sir, may I have another," you wonder where to begin.

I had my opportunity to excel when the Commandant of the Marine Corps assigned me to be the Marine Corps' spokesperson in an interview with Mike Wallace for *60 Minutes*.¹ The story was on the pending general courts-martial of two of the aircrew of the Marine EA-6B Prowler that struck and severed a ski gondola cable near Cavalese, Italy in 1998, killing 20 people.² I had some prior experiences in dealing with the media on pending military justice matters, notably daily sessions with the national media during the 1987 court-martial of then-Sergeant Clayton Lonetree for espionage while a Marine Security Guard at the U.S. Embassies in Moscow and Vienna.³

This article is based on those and other experiences I had while on active duty⁴ and my current view of military justice and the media from my position in the Office of the General Counsel of the Department of Defense.⁵ Although this article focuses on preparing for the media interview, it also addresses many issues that commanders and their military justice advisors should consider whenever they deal with the media.

The Need for Justice

When I was a platoon commander, my junior enlisted personnel used to ask a question whenever there was a rumor that an officer or a staff noncommissioned officer had committed misconduct but had not received formal disciplinary action. The question was asked with the tongue-not-so-in-cheek humor one associates with young enlisted personnel. The question was, "Is it justice or just us?"

Those young Marines had a certain understanding of what justice means. That understanding was that justice meant a system that they could trust because it treated each accused similarly, regardless of grade, was fair, never convicted an innocent person, and awarded reasonable punishment to those convicted. While I recognize that the "what is justice?" debate may become quite complex, in this article I will refer to justice as my young Marines taught me thirty years ago.

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Protecting the search for justice inherent in the American criminal process colors all that the military says, and does not say, to the media regarding individual military cases. Why? Without justice, the system breaks down. Without a properly functioning system, good order and discipline breaks down. Without good order and discipline, the military's ability to accomplish assigned missions breaks down and national security is placed at risk. All three branches of government have long recognized the vital role that a properly functioning military justice system plays in mission accomplishment, and each branch has helped craft the current military justice system.

Congress enacted the Uniform Code of Military Justice (UCMJ) in 1950⁶ as a result of the uneven performance of the disparate military justice systems during World War II. The UCMJ established one system common to all five armed forces.⁷ During the ensuing 50 years, Congress has refined the UCMJ through legislative action.

In the Executive Branch, Presidents have implemented the UCMJ in a series of executive orders that comprise the Manual for Courts-Martial (MCM).⁸ The MCM includes procedural and evidentiary rules for courts-martial, guidance on the punitive articles, and procedures regarding non-judicial punishment.⁹ In the Department of Defense, the Joint Service Committee¹⁰ conducts an annual review of the MCM and other military justice matters, and proposes appropriate changes to regulations, Executive Orders, and statutes. Further, military commanders (whose central role in all military matters, including military justice, is both essential and irreplaceable) are not hesitant to voice concerns regarding aspects of the system that they consider work against justice.

The Supreme Court and the subordinate federal courts, including the United States Court of Appeals for the Armed Forces,¹¹ also play an important role in military justice. The Supreme Court has reviewed several cases over the years related to the military and military justice. A brief summary of those decisions might conclude that: the Court gives primacy in military matters to the legislative and executive branches; the Court believes that the military justice system may exist quite properly under the Constitution as a unique system of criminal law not subject to all of the Constitutional requirements applicable to civilian criminal courts; and that the Court believes that the federal courts should give great deference to the other branches, and to military commanders, in reviewing military issues.¹² In each military justice case, the Supreme Court's eye has clearly been focused on ensuring that the military justice process provides justice to all those brought before it. Thus, the Congress, the President, the military, and the courts are united in their efforts to ensure that justice remains the very essence of the process. One threat to justice in any criminal justice system is prejudicial pretrial publicity.

The Threat to Justice

American civilian and military criminal justice systems seek to balance the obligation to keep the public informed with the obligation to seek justice by avoiding any pretrial publicity that could possibly taint the criminal process and potentially frustrate the search for justice.¹³ The obligation to seek justice includes ensuring that one person's liberty is not jeopardized due to a well-intentioned but mistaken effort at informing the public about the case. All American criminal justice systems attempt to withhold disclosure of any potentially prejudicial information about the case until after the trial has concluded.

The reasons for the concern about potentially prejudicial pretrial publicity are simple. If a juror finds out from pretrial publicity that an accused has confessed to a crime, common sense

says that it is likely that the juror will approach the trial with the opinion that the accused is guilty. This would stand the presumption of innocence¹⁴ on its head. Similarly, if a potential sentencing or good character witness finds out that the accused has confessed, he may decide not to testify. When the judge later rules that the confession was obtained illegally, neither the juror nor the witness can ever be placed back in the position they had been in before the pretrial publicity jeopardized the search for justice. This fundamental concern about prejudicial pretrial publicity could cause the military to resolve the issue by not discussing pending military justice matters with the media at all.

Why Should the Military Talk with the Media?

This is perhaps the most fundamental question in military-media relations. It is a broad, all-encompassing question that strikes at the heart of American government. How you answer other questions, and how you approach other issues, depends in large measure upon your answer to this question.

Almost no one, not even the media, argues that the military should report everything, providing complete access on all issues.¹⁵ On the other hand, a significant number of military personnel argue that the military should provide the media with only that amount of information that absolutely must be disclosed, and that media access to all things military should be limited and closely controlled. Others try to strike a balance between the extremes.

Commands are often asked to provide information to, or to be interviewed by, the media. For military and civilian personnel not in a public affairs office, these requests are often an additional burden of no apparent consequence in accomplishing the mission. In fact, the often-held perception is that the media will distort whatever is said, get the facts or the process (or both) wrong, and create a problem through their story when no problem currently exists. A logical response to that perception is to deny media requests whenever possible, and when denial fails, to provide as little information as possible. However, that logical response is misguided.

We are fortunate to serve the United States of America, a great nation in large part because our Founding Fathers had the wisdom to pen the Constitution, and our predecessors the courage to place the Constitution and its principles ahead of narrower interests. We, of course, should do no less. The Constitution does not directly address the media and the military. It does offer guidance on why and how the military should approach the media. The First Amendment guarantees freedom of the press.¹⁶ Our founding fathers provided this constitutionally protected role for a free press to serve as a fundamental check on the government by providing the truth about the government to the American people. Armed with this truth, the American people are better able to evaluate the policies and actions of their government, petition the government, and exercise their right to vote.

This is perhaps why we so often hear the media talk about “the public’s right to know.” Although there is no express “right to know” in the Constitution, the bedrock principle of our democratic form of government is that ours is a government “of the people, by the people and for the people.”¹⁷ The people must be able to make informed judgments to make democracy work, and they need information from the government and its critics to be able to make those informed judgments. The people gain the information they need from an ever-increasing variety of sources, but there can be little doubt that they receive most of that information through the media.

The media gathers its information from sources--big and small, formal and informal, official and unofficial. A particularly important source of this information is the government. The people then sift through this tub of information, sorting the credible from the incredible and forming opinions about the issues so that they may make informed decisions.

Communicating with the public through the media is also important for the government, including the military. This is why every Executive Branch agency holds regular media briefings. In the Department of Defense, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff often appear as the military's briefers at these sessions.¹⁸ They present brief statements on issues of importance and answer the media's questions on a wide variety of topics. Both are busy men, but both see that informing the American public, and the world, is so critical that they make time for regular sessions with the media.

A constitutional perspective provides another reason for the military to speak with the media. The Department of Defense is an agency of the government, which serves the people. The Department's employees, military and civilian, swear an oath to support and defend the Constitution and to bear true faith and allegiance to the same.¹⁹ Providing the American people with information about military activities, including matters of military justice, is a most logical extension of this oath to the constitution and the democratic process the Constitution created. One might well conclude that the military has a Constitutionally-based obligation to provide information to the American public.

The military may not satisfy this obligation to inform the public merely by public affairs announcements of exercises, procurements, promotions, and similar good news. This obligation includes discussing the bad news that is also inherent in the military such as training accidents, other disasters, and criminal misconduct.²⁰ This obligation also includes correcting the record when misleading or false information finds its way into the media. How or why that misleading/false information was published is not relevant to this obligation; the fact that the American people receive misleading or false information in the media regarding the Department triggers an obligation on the Department to consider how best to correct the record—for the American people.

Finally, this obligation does have limits.²¹ Defining those limits is an important issue that the commander, the public affairs officer and the lawyer must consider in every release of information to the media, including in every military justice matter that catches the public's attention.

What Should the Military Tell the Media?

Normally, the release of information in a military justice matter does not raise the issue of putting personnel in the field at risk of death, or of jeopardizing intelligence sources and methods. When those issues do arise, we clearly would not release that information to the media. Indeed, we have rules that protect classified information from release to the public, even during a court-martial.²²

The more difficult issue is deciding what information to release without creating prejudicial pretrial publicity. In making this assessment, the military focuses on protecting the unique value that is the very essence of military justice--justice itself. The military's traditional approach has been to release relatively little information. In the past decade, however, the military has moved to an approach that releases more information earlier in the process--but still with an eye on justice and avoiding prejudicial pretrial publicity.

The Traditional Approach to Pretrial Publicity

For many years, the military found it relatively easy to avoid any potentially prejudicial pretrial publicity, because, in the main, little public and hence media attention was focused on military justice. An occasional case would become a public and media sensation, but, by and large, the military justice system did not function on center stage.²³ However, in the past decade, the media has increased coverage of significant military justice cases.²⁴ This increased coverage often includes speculation about pending matters and occasionally the use of the media by the defense team to get their messages across to the public. As a result, the public record sometimes is incomplete and therefore misleading unless the military counters the speculation and defense messages with facts. Failure to complete the record risks having the media and the public misunderstand the case, the military justice system, and the military's actions regarding the case. Thus, the military's approach to providing information about pending military justice matters to the media has had to change to ensure that the public's knowledge of the case is as accurate as possible without risking prejudicial pretrial publicity. Most military justice practitioners agree that the seminal event that caused this readjustment was the Kelly Flinn case in 1997.

A relatively minor case on the scale of criminal behavior, the Kelly Flinn case began as a typical good order and discipline matter. An officer, then-First Lieutenant Kelly Flinn, engaged in an unduly familiar personal relationship with the civilian spouse of a young enlisted service member; the enlisted spouse complained to the officer's command; the officer's commander took the traditional tact of treating the matter in an informal, administrative manner by ordering the officer to end the relationship; the officer took the rather unusual step of violating the order and continuing the relationship; and the commander commenced criminal action to hold the officer accountable for violating the order and continuing the relationship.

The spin that made the case interesting to the public and the media came when the defense team seized the publicity initiative.²⁵ They painted the picture of a young female officer engaging in consensual adult sexual conduct with a civilian. This was, they asserted, at worst a simple case of adultery, which wasn't a prosecutable crime anywhere except in the morally conservative military. Not addressed was any concern for the aggrieved military spouse, the violation of the commander's order, or the breakdown in good order and discipline that was likely when an officer was perceived to be a party in destroying the marriage of an enlisted service member. The media picked up the story and, to the surprise of probably everyone, found the public quite interested. A media frenzy ensued. The omnipresent television and radio news shows gave the case near constant national attention, with members of Congress, retired general officers, and media pundits reviewing the case and its developments seemingly every day in print, on radio, and on television.

The Air Force answered the increasingly widespread public and media outcry very carefully. Following the traditional conservative approach of avoiding any pretrial publicity that might prejudice the case at any future court-martial, the Air Force made the normal broad, general replies that focused on the integrity of the military justice process, the need for good order and discipline, and the adverse affect that adultery and violating lawful orders can have on good order and discipline. In the sensation of the moment, these statements seemed, to many members of the media, to support, rather than challenge, the defense team's assertions. Overall, they were lost in the clamor of pro-defense rhetoric. Even the release of additional charges that

Flinn had lied to the investigators and engaged in fraternization was insufficient to bring any balance to the public discussion.

Finally, the Air Force Chief of Staff seized an opportunity to bring some balance to the public discussion of the case. At a Congressional hearing, in clear, unambiguous terms, he set out the Air Force's side of the story.²⁶ This was not an adultery case; this was a case about a violation of a commander's order to an officer to cease an unduly familiar relationship with the spouse of a young enlisted service member. There was a victim in this case and the victim was not Lt Flinn. The victim was the young enlisted woman who had placed her trust in the "officers appointed over" her.²⁷ This straightforward statement from the senior officer in the Air Force brought much of the sensationalism to an end, but the damage had been done.

The senior leaders in the military, civilian and uniformed, were surprised at what had occurred. Their conclusion was that the military's traditional, conservative approach to publicity had failed the Air Force. Their solution was to change the mindset of those most responsible for pretrial publicity: commanders, lawyers, and public affairs specialists. Their change was a tilt toward a more open approach in discussing military justice matters with the public through the media, and a tilt toward responding more quickly, directly, and forcefully to statements made by defense counsel whenever necessary to correct or balance the record for the public.²⁸

The New Approach to Pretrial Publicity

This change in approach to pretrial publicity coincided with a new, expanded interest by the media in the military, including military justice. As news shows flooded the television and radio markets, the hunt for news that scored high ratings drew the media toward military stories of interest to the public. Those stories focused less on exercises, training, and daily activities and instead on deployments overseas and the more sensational military justice cases. In fact, in the past decade, it is fair to say that the media has discovered military justice.²⁹

What makes a military justice matter newsworthy is difficult to say. Who is involved, the nature of the allegations and the context of the case are clearly the key factors, but some cases that appear to have the necessary ingredients to be newsworthy are often overlooked. A murder case without another ingredient is normally insufficient, but one involving multiple deaths almost always garners at least some coverage. Allegations against a flag or general officer, or very senior enlisted personnel, tend to make the headlines, as do allegations of sex in senior-subordinate relationships. Training mishaps that include allegations of negligence and that cause multiple deaths, especially of civilians, also tend to generate media interest.

Since the Flinn case, each Service has had several opportunities to use and refine this new approach. One of the more aggressive examples was, not surprisingly, from the Marine Corps. In 1998, the Commandant of the Marine Corps decided to have a Marine Corps representative appear on the *60 Minutes* television program for an interview with Mike Wallace about a pending military justice matter of national interest. What was pending were two general courts-martial of the pilot and co-pilot of an EA-6B Prowler jet aircraft that severed a cable supporting a gondola in the mountains near Cavalese, Italy, resulting in the deaths of all twenty occupants.

The Commandant's decision was not an easy one. He would have no control over what parts of the interview *60 Minutes* chose to use in the show, over how the interview was edited or over what issues were presented and how they were addressed. In addition, the two general courts-martial were yet to begin on the merits. Anything said by the Marine Corps spokesperson would likely be used in support of defense motions regarding the adverse effect of prejudicial

pretrial publicity on members and potential witnesses, unlawful command influence and any other purpose that might seem appropriate based upon what was said.

I was that Marine Corps spokesperson. From that experience, many others regarding media relations that I have had in my career, and what I have heard from others who have faced the media, I offer the following practical suggestions on the media interview regarding a military justice matter. Although these suggestions focus on the in-depth, adversarial type of interview, they apply to some degree to all media interviews.³⁰ Keep one thought in mind as you read the remainder of this article: in dealing with the media, as in waging war, “He who will not risk can not win.”³¹

Alternatives to the Media Interview

Before agreeing to engage in a media interview regarding a military justice matter, especially if the matter is pending, the military should evaluate alternatives to the interview. Alternatives include making no statement at all, issuing a written statement, issuing a general press release, developing responses to queries or, perhaps, working with a different, more friendly media organization to publish a preemptive, similar story with extensive comments from the government. Some combination of these alternatives is also possible.

Denying the request for an interview and making no statement at all must be considered as a first option. The proliferation of news shows in the non-print media and the increasing number of print media that do in-depth articles on issues related to military justice make it all but impossible to be available for every requested interview. So, at some point, saying no will occur. What is the risk?

Without the military’s position on the issues, there is a heightened risk that the story will be unbalanced and potentially misleading. In addition, those reading, listening or seeing the story may interpret the military’s refusal to appear as “guilt by silence” to the allegations made in the story about military mistakes or intentional wrongdoing. The military’s silence also cedes the initiative to the defense and other sources in framing the issues and informing the public about the case and the process.

Issuing a letter to the requesting media organization declining the interview request but setting forth, succinctly, sound bites they may use might appear to be a much better option.³² When the media uses those sound bites in a balanced story, this approach has merit. But the media may choose to state that the government refused to be interviewed for the story and make no further use of the letter, or may edit one or more of the letter’s sound bites into the story in such a way that it confuses rather than clarifies, and misrepresents rather than explains.

The military could attempt a preemptive strike by issuing a general press release addressing the issues likely to be the centerpiece of the interview. This press release might generate a number of stories before the interview-related story aired, perhaps taking some of the air out of that story’s sails, ratings and effects. However, it is also possible that having several stories generated immediately before the airing of the interview-related story could stoke additional interest in that story and heighten its ratings and effects. Of course, the military would have no control over whether the press release generated any stories at all; and, if it did, over the content of any stories that were generated by the release, including whether and how the press release was used in those stories.

After any major story about the military appears in the media, the military receives follow-on questions from the media. This gives the military the opportunity to make

rebuttal/explanatory points publicly. Again, a press release is a possibility; so is a carefully crafted series of responses to likely inquiries. While the responses may be masterfully put together, there is no guarantee that the correct questions will be asked (indeed, that any questions will be asked), that any follow-up articles will be written, or that the masterfully crafted responses will find their way into any follow-up articles.

Deciding whether to agree to the media interview or use one of the alternative approaches is a command, and in some cases service-level, decision. The issues likely to be covered, the status of the case, the existing public record, and a host of other factors should be considered. If the decision is to refuse to do the interview, either a media statement or a set of questions and answers should be prepared for release after the story airs. In addition, key Department of Defense and external leaders should be informed of the story, the likely issue(s), and the military's position.

Occasionally, the military may receive help informing the public of the military's position. A little more than 15 years ago, a military justice case that caught the nation's attention for months on end was the Marine Security Guard espionage scandal.³³ When the dust settled, an investigative reporter wrote a book about the scandal and received a front cover book review from a national publication. Those who had closely followed the scandal considered the book to be more fiction than fact. The Marine Corps and other government agencies took a number of hits in the book, and the article, that they believed were not justified. They wondered how to mount a media counter-attack to balance the public record.

Meanwhile, an internal debate raged within the national publication. The office that wrote the book review was not the office that had followed the espionage scandal. That latter office also believed the book to be more fiction than fact and decided to write a rebuttal article listing the inaccuracies in the book and the facts. They approached the Marine Corps for help.

The resulting article ran for a full page in the national publication. It criticized key parts of the book, citing inaccuracies and correcting the record with facts. The article proved to be the perfect vehicle for the Marine Corps to use to set the record straight.

Who Should be the Command Representative?

What should one look for in the model command representative for the interview? The representative should be senior enough to appear to the public to be an expert regarding what he says, present a good military appearance to command some immediate attention to what he says, be well spoken with a tendency toward concise rather than rambling statements, know the case, substance and process, well, and know the military justice system well.

Three principle candidates are always available to be the command spokesperson—the commander, the staff judge advocate, and the public affairs officer. None are particularly attractive candidates for various reasons explained below.

The commander receives the most immediate respect from the media and the public due to his grade, his position of command, and his role as the decision maker in many key aspects of a case. However, he also is the one whose real and apparent independence and objectivity is most important and most questioned. Any public statement a commander makes about a pending military justice matter will be, quite properly, examined carefully by the defense team for any indication of unlawful command influence. As a result, the commander often is reduced to making comments about the military justice process and not about the case itself. This reality may make the commander the least effective person to use in countering defense team

allegations in the media, presenting the government's side and responding to related matters as they arise.

The staff judge advocate suffers from many of the same limitations. As the lawyer for the commander, required by law to provide impartial legal advice on every aspect of the court-martial from initial disposition to ultimate resolution, the staff judge advocate would similarly be reduced to speaking only of process and not the substance of the case. While better trained on the process than the commander, and therefore a potentially more informed and persuasive advocate for the military justice process, the staff judge advocate remains a poor choice for the intended purpose of presenting the military's position to the public via the media. There is also a recurring concern about a command being seen as hiding behind the glib advocacy of its lawyer.

The public affairs officer may well be the most polished and persuasive in dealing with the media but normally has the least knowledge of the case and the military justice process. He also may be perceived as the professional mouthpiece of the command and may not have the credibility of an operator within the system. Of the three, he is by far the least risky choice but also the one who would have to learn the most about the case and the process to be effective.

Given the problems with using any of those three officers, other options should be explored. At times, retired officers or other outside experts have been used to present the military's position. This reduces the risk of having their comments linked to the command and thus adversely affect the pending courts-martial. At other times, a subject matter expert from outside the command is brought up to speed on the specifics of the case and then used as the media representative. Once an individual's role in the case has ended (e.g., a preliminary inquiry officer, an investigating officer, a transferred staff judge advocate), he may become a good candidate to be a media representative.³⁴

On balance, using an individual who was, but no longer is, involved in the case may well be the best option. The individual likely will have no further connection with the case (except, perhaps, as a witness), should have substantial knowledge of the case, and is less likely to be perceived as a spokesperson for the commander. If such a person isn't available, then using a retired officer or other senior subject matter expert from outside the command is probably the next best option because the only downside is the learning curve regarding the case. Using anyone connected with the case simply raises too great a risk of creating a perception of unlawful command influence. Once someone is identified to represent the military, the most important part of the process begins: preparation.

Preparation, Preparation, Preparation

The old saw--that if in real estate the three key ingredients are location, location and location, then the three keys in litigation are preparation, preparation and preparation--applies equally to the media interview. Preparation for the media interview includes developing sound bites and responses to likely questions, staffing your proposed answers, and practicing to make perfect by using mock interviews.³⁵

Preparation can be a one-person operation. Successful preparation cannot. If the case in question is of national significance and the media interview is of national scope, then the preparation should reflect that level of significance. Each agency or office that has a stake in the likely issues to be raised should have a member on the interview preparation team.³⁶

The media controls what parts of the interview they are going to use, and they normally will not use long replies. The team should identify the key messages it wants to convey during

the interview and condense them into concise statements or sound bites. The statements should be devoid of legalisms and relate directly to the intended audience.

A careful review of the issues the defense, other commentators, and the media have raised should give the government a good idea of what the likely questions will be during the interview. In crafting answers, the team should weave in the key messages they previously developed. Again, the answers should be concise and clear.

All answers must tell the American people the truth. "We need to tell them the truth," Secretary Rumsfeld recently said, "And when you can't tell them something, we need to tell them that we can't tell them something."³⁷ When the representative cannot answer a question because of concern that the answer may be prejudicial, the representative should explain why. Because each question and answer in this type of interview is discrete, the representative will have to repeat the explanation each time it should be part of the answer, or it will be a glaring omission when the show is aired.

The members of the team should then brief their senior leadership to ensure they know what the proposed answers and sound bites are and agree with them. There should be no surprises within the Department to any answer by the military representative that airs on the program.

The mock interviews should be similar to witness preparation for a trial. They should be run as though they were real interviews from the moment the representative arrives on set; they should be taped; and the representative should be given a copy of each tape to study. All members of the interview preparation team should attend each mock interview and participate in all critiques. One option that works well is to conduct a series of three mock interviews.³⁸

The first would be a slow-paced, exhaustive effort that covers all possible issues. The mock interviewer should ask a complete set of potential questions in a firm but non-aggressive approach. The mock interviewer may follow up on particularly vague answers but should not attack the representative. After the interview, the representative should be debriefed immediately on style and substance. On style, the focus is on posture, expressions, eye contact, hand gestures, diction, speed of delivery, and related issues. On substance, the focus is on using opportunities to repeat the sound bites and ensuring answers are clear, concise, and hit the key point(s) identified by the team.

The second mock interviewer should be aggressive, abrasive, and tough. The mock interviewer should have an in-depth knowledge of the case and military justice and should be relentless in trying to box the representative into corners on the military justice process and the handling of the case. The interviewer need not cover all potential issues, but should hit all of the more significant issues that are likely to be raised. The mock interviewer should pursue every poor answer relentlessly. This interview gives the representative an opportunity to face a much harder interview than is likely in real life, forces the representative to think quickly under great pressure,³⁹ and allows the after action review to assess the sound bites and proposed answers for clarity and conciseness in a hostile atmosphere. If changes need to be made to any proposed answer, the change should be staffed as appropriate.

The public affairs member of the interview preparation team should conduct the last mock interview. It should replicate as much as possible the actual interview. At this stage, the emphasis should be to hit all key points and to follow up immediately on any weak answers. The critique should make final adjustments to answers and sound bites and fine tune presentation and delivery.

One issue that should be raised with the media company is taping of the interview. In general, it is best if both the media and the military tape the interview. This helps in resolving any subsequent dispute about what was said, especially the context within which an answer was given.⁴⁰ If logistics prevent the military from taping the interview, the media organization should be required to give the military a copy of the interview tape immediately after the interview and not after the show is aired.⁴¹

The Media Interview

With prior proper planning and preparation, the representative should be ready for the interview, comfortable that he knows what is probably going to be asked, confident that he knows how to answer virtually anything that might be thrown his way, and ready to engage in a battle of wits with the interviewer. I don't know of any remedy for nervousness other than realizing that some nervousness is necessary to perform your best.

The public affairs representative to the team should make all of the logistical arrangements for the interview, attend the interview, do a final check of the appearance of the military representative before the interview begins, and ensure that the rules for the interview are followed. For example, a rule may say that the interview will not last more than 45 minutes. At that time limit, the public affairs representative should end the interview absent some compelling reason to continue.⁴²

A cardinal rule of all interviews is that everything is on the record, whether the camera is rolling or not. The interviewer may spend a few minutes when the military representative first arrives shooting the breeze, allowing the camera crew to make final corrections to angle and position, and relaxing the representative. The rule of clear, concise, and on-message comments applies even before the cameras begin to roll.⁴³

When conducting taped interviews, some media interviewers interrupt themselves when asking questions to rephrase or re-modulate their voices. They may offer the military representative the same opportunity. If the representative doesn't like the way an answer is going, he may stop and start over. The media interviewer will claim that they will not use any answer that the military representative interrupts in this manner. Any military representative would welcome such a ground rule, assuming he can trust the media's promise. It ensures that only those answers the military representative believes are reasonably decent will receive airtime. On the other hand, having that opportunity to correct mistakes or inartful language may cause the representative to be too relaxed or to lose focus knowing that correction is possible. It also allows the interviewer to hear exactly what changed in the answer, which the interviewer may then ask about in follow-on questions.⁴⁴

When the interviewer finishes with the prepared list of questions or issues, other members of the media organization (e.g. director, producer) may suggest further areas of inquiry. Because they have been listening to the interview without participating, their suggestions may be quite pointed and focused on areas of weakness in the military representative's answers. The tip is to neither let your guard down nor put your mind in neutral until you have left the interview site.⁴⁵

Final Thoughts

Dealing with the media is not an additional burden unrelated to normal work in the Department of Defense. Dealing with the media is an inherent and important obligation of normal government service, military or civilian. In a democracy, the people govern and rely upon the military to provide them the information they need to govern wisely. Not all information that the military possesses should be released to the people, however. Exceptions include classified information, information protected by the Privacy Act, and prejudicial pretrial publicity.

The military must balance its concern regarding potentially prejudicial pretrial publicity with its obligation to keep the public informed. A balance tipped too far one way or the other jeopardizes either the public's right to know about its military's operations or the accused's right to a fair, and just, trial. In maintaining a proper balance, the military must ensure that public information about a case is accurate and properly depicts the military's position.

When ensuring a proper balance requires Department of Defense participation in a media interview, the individual chosen to represent the military should be of an appropriate grade and position, knowledgeable about the case and the military justice system, and present a professional image in appearance, demeanor, and speaking ability. The representative should prepare thoroughly, using a team approach to identify potential issues, frame sound bites and appropriate answers, and practice the interview itself.

Mike Wallace called me the week after my interview aired on *60 Minutes*. He asked me what I thought of the show. I told him that while I thought the show was more balanced than I had thought it might be, I still thought it could have been more balanced. He indicated that the answers we gave to the questions he and his producer posed caused them to re-edit the show to focus more time on the Marine Corps' position than they had originally planned. From my perspective, this meant that the public was better informed by a more balanced show. Equally important, the show did not prejudice the search for justice at the ensuing courts-martial. My conclusion is that the military can inform the public about military justice matters while protecting justice and the integrity of the military justice process. In the Cavalese case, the Commandant's decision to take a risk by having a Marine Corps representative appear on *60 Minutes* while courts were pending turned out to be a risk well taken. The show was better balanced and the public better informed, without putting justice in jeopardy. I hope that the tips in this article may help others strike a similar win-win balance in future military justice matters of national media interest.

Notes

¹ The interview was taped at the CBS Studios in New York and aired in early 1999.

² On the date of the incident, I was the Staff Judge Advocate to the Commander, Marine Corps Forces, Atlantic. He convened the investigation into the incident, was the disposition authority for all resulting military justice matters, and was the convening authority for the general courts-martial. I transferred from that command shortly after referral of the charges to general courts-martial.

³ The Lonetree investigation and trial received as much national media attention as any military justice matter ever has. Then-Sergeant Lonetree was convicted of being a spy for the Soviet Union's KGB (the Soviet Union's Committee for State Security responsible for Soviet intelligence and counter-intelligence functions). His sentence included a dishonorable discharge and 30 years confinement.

⁴ In 1995, I was the Department of Defense (DoD) spokesperson, along with Brigadier General Ted Hess (USMC, Ret.), on an *American Justice* program on military justice that aired on the A&E network. This interview was not confrontational but quite lengthy, lasting over two hours. In contrast, my interview with Mike Wallace lasted 45 minutes...but seemed much longer.

⁵ In 2001, I was a panelist at the three day Military-Media conference sponsored by the McCormick Tribune Foundation outside Chicago. The subject of the conference was “Military Investigations and Civilian Leadership.”

⁶ The UCMJ was enacted on May 5, 1950.

⁷ Federal law defines “armed forces” to include the Coast Guard, even when not operating as a service in the Department of the Navy. *See* 10 U.S.C. §101(a)(4) (2002).

⁸ The current edition of the MANUAL FOR COURTS-MARTIAL, UNITED STATES [hereinafter MCM] was published in 2002.

⁹ Authorized under Article 15, UCMJ, non-judicial punishment goes by many names, including: NJP, Article 15, Captain’s/Admiral’s Mast and Office Hours. *See* 10 U.S.C. §815 (2002). *See also*, MCM, pt. V (2002).

¹⁰ *See* DEP’T OF DEFENSE, Dir. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE (May 8, 1996).

¹¹ Congress created the United States Court of Appeals for the Armed Forces (CAAF), originally known as the Court of Military Appeals, in Article 67, UCMJ. *See* 10 U.S.C. §867 (2002). CAAF consists of five civilian judges and is the second tier of appellate review of courts-martial. Article 68, UCMJ, authorizes petitions for certiorari to the United States Supreme Court from CAAF decisions. *See* 10 U.S.C. §868 (2002).

¹² *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957); O’Callahan v. Parker, 395 U.S. 258 (1969); Solorio v. United States, 483 U.S. 435 (1987); Weiss v. United States, 510 U.S. 163 (1993); and Clinton v. Goldsmith, 526 U.S. 529 (1999).

¹³ *See generally* AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: FAIR TRIAL AND FREE PRESS (3rd ed. 1992).

¹⁴ *See, e.g.*, U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGE’S BENCHBOOK April 1, 2001, Ch. 8, Sec. III, para. 8-3 (provides language regarding the presumption of innocence and the government’s burden of proof in courts-martial).

¹⁵ The Secretary of Defense has said, “[T]here’s no question that I don’t answer things I don’t want to answer. I don’t discuss future operations. I don’t discuss intelligence matters. I don’t reveal classified information.” Interview by Marvin Kalb with Donald H. Rumsfeld, Secretary of Defense, Washington, D.C. (Apr. 10, 2002) [hereinafter Kalb interview].

¹⁶ The First Amendment says, “Congress shall make no law...abridging the freedom of speech, or of the press. . . .” U.S. CONST. amend. I.

¹⁷ President Lincoln once said, “. . .and that government of the people, by the people, for the people shall not perish from the earth.” President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

¹⁸ The Secretary of Defense personally briefed the media more than 60 times in the first six months after September 11, 2001.

¹⁹ *See, e.g.*, 5 U.S.C. § 3331 (2002) (oath of office for officers and civilian employees); 10 U.S.C. § 502 (2002) (oath for enlisted personnel).

²⁰ For example, the military held media briefings by very senior officials on the friendly fire incident at Tarnak Farms, Afghanistan, in 2002, on the sinking of the Japanese merchant vessel *Ehime Maru* by the *USS Greenville* in 2001, and on the terrorist attack on the *USS Cole* in 2000.

²¹ *See* Rumsfeld quotation, *supra* note 15.

²² *See* MCM, Mil. R. Evid. 505 (2002).

²³ For example, the military justice matter that generated perhaps the most national media interest in the 1980s was the Lonetree case. *See supra* note 3. However, most military justice matters, even the most significant, were normally not the subject of media focus.

²⁴ Examples include the Blackhawk shoot down incident in northern Iraq in 1995, the Kelly Flinn matter in 1997, the Cavalese, Italy, EA-6B incident in 1998, the *USS Cole* bombing in 1999, the *USS Greenville* collision in 2000, and the Tarnak Farms, Afghanistan friendly fire incident in 2002.

²⁵ The defense team was led by retired Air Force Lieutenant Colonel Frank Spinner.

²⁶ *See Newshour: Incidental Adultery?* (PBS television broadcast, May 22, 1997) (transcript on file with USAF ACADEMY JOURNAL OF LEGAL STUDIES). *See also*, Elaine Sciolino, *Air Force Chief Has Harsh Words for Pilot Facing Adultery Charge*, N.Y. TIMES, May 22, 1997, 1.

²⁷ All enlisted members of the armed forces swear an oath, “To support and defend the Constitution of the United States...and to obey the orders...of the officers appointed over me...” 10 U.S.C. § 502.

²⁸ One example of this change was the decision to have a panel at the 1998 Marine Corps Staff Judge Advocates’ Conference on “When Your Military Justice Case Becomes a Public Affairs Disaster.” The learning point from the panel was that the military had to be more forthcoming in ensuring the media reporting on a case was accurate and presented both sides of key issues...without generating prejudicial pretrial publicity.

²⁹ Examples include the court-martial of the Sergeant Major of the Army, the Army's sexual harassment cases at Aberdeen, Maryland, the court-martial of a retired Army general officer, and those military justice matters cited previously in note 24.

³⁰ Media interviews vary in format and include background interviews that are off the record; not for attribution or attribution only to "a defense official;" news briefings normally conducted by public affairs specialists; public statements followed by question and answer sessions; and the often adversarial *60 Minutes* type interview.

³¹ This quote is attributed to John Paul Jones, now buried in a crypt beneath the chapel at the U.S. Naval Academy. Perhaps his most famous quote, also worth remembering when dealing with the media, was, "I have not yet begun to fight!"

³² Sound bites in such a letter might include, "The military justice system is fair and just", "Commenting on a pending military justice matter puts justice at risk", and "The case is pending; lets give the men and women who make military justice work a chance to judge the case before we jump to conclusions."

³³ See *supra* note 3.

³⁴ I had been transferred from being the Staff Judge Advocate for the commander handling the Cavalese, Italy EA-6B incident before being named the Marine Corps representative to discuss the case on *60 Minutes*. I am quite sure I would not have been selected had I remained as Staff Judge Advocate.

³⁵ This section tracks the process I used to prepare for the *60 Minutes* interview regarding the Cavalese case.

³⁶ Preparation for the Cavalese *60 Minutes* interview included the aviation, safety, public affairs, operations, plans and judge advocate divisions at Headquarters, Marine Corps.

³⁷ See Kalb interview, *supra* note 15.

³⁸ We used three mock interviews to prepare for *60 Minutes*. We ran them as described in the article. My comfort level, answers and "appearance on camera" improved significantly after each dry run.

³⁹ Although the mock interview is only practice, peer pressure is a great motivator. I worried about each mock interview, and felt real pressure during my second, "hostile" mock interview.

⁴⁰ Older Marines recount as gospel that in a taped television interview of a former Commandant parts of two separate statements he made were linked together in the televised program, creating a misimpression of the context and meaning of his remarks.

⁴¹ The Cavalese *60 Minutes* interview was to be taped at Headquarters, Marine Corps, with both the Marine Corps and *60 Minutes* taping the interview. However, on the day of the interview part of the *60 Minutes* team (including Mike Wallace) was unable to leave New York due to an ice storm. Two Marine Corps public affairs officers and I took a train to New York that day. As a result, the Marine Corps was unable to tape the interview and, to my knowledge, never received a copy.

⁴² The agreed upon time limit for the Cavalese *60 Minutes* interview was 30 minutes. When we reached that time limit, the *60 Minutes* producer asked for more time because they had not completed their list of prepared questions. The Marine Corps public affairs representatives, who until then I had considered friends, agreed to extend the interview for an additional 15 minutes. My interview with the *American Justice* program lasted more than two hours.

⁴³ I met Mike Wallace in the interview room. We sat down and he immediately said something like, "This isn't going to work! I told you this wasn't going to work! Get me a pillow!" I was confused, wondering what I had done. Mr. Wallace explained that it is important in these interviews for the person asking questions to appear on camera to be as tall or taller than the person providing the answers. Mr. Wallace is shorter than I am, but two pillows later we were ready to begin.

⁴⁴ Mike Wallace afforded me this opportunity, but I chose not to use it.

⁴⁵ When Mike Wallace announced that he had finally finished my *60 Minutes* interview, the producer asked him to pursue two more areas of inquiry. After handling the first area, Mr. Wallace couldn't articulate a question in a way he thought appropriate. He asked the producer to help, but the producer was also unable to do so. By that point, I had enough time to think up a good answer to the question so suggested language to them. Mr. Wallace asked if I thought I had a good answer, I said I did, and he used my language to ask the question. After I answered, he said something like, "Good answer but it will probably end up on the editing room floor." It did.